IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.204 OF 2007
WITH
CIVIL APPLICATION NO.1638 OF 2006

Ramu Gadade & Ors. ..Appellants.

V/s.

Bapu Limbaji Gadade & Ors. ..Respondents.

Mr.P.K.Hushing for appellants.

Mr.Rahul S.Kate for respondent Nos. 1 to 6.

CORAM: A.M.KHANWILKAR,J

DATE : JULY 16, 2007.

P.C. :

1. Heard counsel for the parties. Admit on the substantial question of law to which I shall presently refer.

2. Having regard to the limited controversy in this appeal, counsel appearing for both the parties agreed for final disposal of the appeal.

3. The appellant in this appeal has raised two issues. The first is regarding the suit filed by the respondents being barred by principle of res judicata in view of the previous suit being RCS 153/1978 and RCS No.60/1979. In so far as this issue is

concerned, I am in agreement with the view expressed by the two Courts below that the suit filed by the respondents was not barred by the principle of res judicata. For, the present suit is a substantive suit for relief of partition and possession. The former suits were merely for declaration and injunction. It is open to the coparcener to limit the relief of declaration that the transaction entered into by the Karta with third party was not for legal necessity of the family and therefore, not binding on that coparcener. It is not necessary that while challenging the validity of such transaction, coparcener should simultaneously necessarily pray for relief of partition of such property or partition of the entire property. Counsel for the appellants would argue that it was imperative for the coparcener to simultaneously ask for relief of partition of the suit property in addition to the relief of declaration and consequential relief in respect of the suit property. This submission does not commend to me.

4. Suffice it to observe that the two Courts below have considered all the relevant aspects of the matter to answer the issue of res-judicata against the appellants/defendants. Besides, whether the

present suit is barred by principle of res judicata would require investigation into questions of fact as to whether the parties were common in all these proceedings and that the point in issue was common and have already been answered.

5. To get over this position, perhaps the argument of the appellants is that it was open to the plaintiffs to ask for relief of partition on the earlier occasion itself, for which reason, the present suit is not maintainable also on account of principle stated in Order 2 Rule 2 of C.P.C. I have already addressed this aspect in the earlier part of the order that it was not imperative for the coparcener while asking declaration in respect of same transaction to simultaneously ask for relief of partition. Accordingly, this submission does not take the matter any further.

6. There is however, another issue raised by the appellants, which is of some significance. According to the appellants, the appellants had specifically contended before the trial Court that the suit filed by the respondents/plaintiffs was barred by law of limitation. In support of this plea, the appellants have pressed into service provisions of Article 110

of the Limitation Act.

7. Indeed, the trial Court has addressed the issue of limitation and answered the same against the plaintiffs and in favour of the appellants. The defendants though not specifically adverted to the efficacy of Article 110 of the Limitation Act, the point remains that there was adverse finding and conclusion reached by the trial Court against the respondents/plaintiffs while dismissing the suit on the point of limitation. Notwithstanding that finding, the appellate Court by the impugned Judgment has not even bothered to formulate the point of limitation, which clearly arose for determination. Assuming that the appellants before this Court did not press for the said point, which is a remote possibility, even then, the appellate Court was duty bound to consider the same also in the context of mandate of section 3 of the Limitation Act, which obligates the Court to answer the same if the fact situation of the case so demands.

8. The counsel for the respondents/plaintifs fairly accepts that the appellate Court even though allowed the appeal of the plaintiffs has not addressed itself to the issue of suit being barred by

law of Limitation at all.

9. Significantly, that was one of the adverse finding recorded by the trial Court; and without overturning the said view of the trial Court, the Appellate Court could not have proceeded to decide the appeal in favour of the Respondents. Accordingly, substantial question of law arises for my consideration such as:

> Whether the appellate Court can reverse the decree passed by the trial Court without formulating appropriate issue and in particular without specifically reversing the adverse finding of the trial Court on the issue of suit being barred by limitation ?

10. Having considered rival submissions, I have no hesitation in allowing the second appeal on this limited aspect. In other words, this Second Appeal ought to partly succeed by setting aside the impugned Judgment of the first Appellate Court and relegating the parties to the first appellate Court, which in turn shall reexamine the question of suit being barred by limitation on its own merits in accordance with the law. Needless to observe that the appellate

Court will consider the contention of the appellants in the context of article 110 of the Limitation Act. All questions in that behalf are left open.

11. Accordingly, this second appeal partly succeeds. The impugned Judgment and order is set aside and instead the Civil appeal No.147 of 1998 is restored to the file of 1st Ad-Hoc Addl.District Judge, Baramati, Dist.Pune, to be heard and considered afresh on its own merits "in relation to the question of suit being barred by limitation only". If the issue of limitation is to be answered in favour of the appellants, that will go to the root of the matter as the suit itself will have to be thrown out at the threshold on that ground.

12. All questions on the point of suit being barred by law of Limitation are left open to be decided on its own merits in accordance with the law.

13. It is once again made clear that the appellate Court will answer the only limited issue of suit being barred by law of Limitation and no other issue, for other issues have been concluded by virtue of the present order. No order as to costs.

14. In view of this order, nothing survives in the Civil Application. The same is disposed of accordingly.

(A.M.KHANWILKAR,J)